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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

REPUBLIC NATIONAL LIFE INSURANCE COMPANY

and

AMERICAN LIFE PENSION HEALTH ASSOCIATES, INC.,
Petitioners,

v.

CALVIN C. SPARKS AND SUZANNE SPARKS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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QUESTION PRESENTED

Whether the Arizona Supreme Court denied the Petitioners due process of law when it

1. Affirmed the trial court's *sua sponte* grant of a directed verdict for the plaintiffs at the close of the plaintiffs' case, thus denying the defendants any opportunity to be heard on the question of their liability to the plaintiffs;

2. (a) Affirmed a jury verdict totalling more than $4.5 million on the basis of a charge to the jury that the Court simultaneously held to be erroneous;

   (b) Refused to disturb its holding that the two petitioners (defendants below) were jointly and severally liable to pay punitive damages assessed by the jury against all three defendants even though the Court also held that the jury had been improperly instructed because the third defendant had committed no wrong and must be dismissed from the litigation;

3. Affirmed the trial court's assessment of attorney's fees against petitioners on the basis of documentary evidence that petitioners were not permitted to see.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioners certify that the following is a complete list of all parties to the proceedings below:

1. All parties listed in the caption of this petition.

2. Planned Security Trust.

A listing naming the parent company and affiliates of Petitioner Republic National Life Insurance Company is reproduced in the Appendix (App. 43a-44a). Republic has no subsidiaries that are not wholly owned, and Petitioner American Life Pension Health Associates, Inc., has no parent, subsidiaries, or affiliates.

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CALVIN C. SPARKS AND SUZANNE SPARKS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioners, Republic National Life Insurance Company and American Life Pension Health Associates, Inc., pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Arizona entered in this matter on June 10, 1982 (Opinion) and July 15, 1982 (Supplemental Opinion).

OPINION BELOW

The Opinion and the Supplemental Opinion of the Supreme Court of the State of Arizona, and the judgment of the Superior Court of the State of Arizona in and for the County of Maricopa are reproduced in the Appendix.

JURISDICTION

The Arizona Supreme Court entered its Opinion on June 10, 1982. (App. 1a-31a). The Arizona Supreme Court entered its Supplemental Opinion and denied Peti-

tioners' timely Motion for Rehearing on July 15, 1982. (App. 32a-33a). On July 16, 1982, the Supreme Court issued its Mandate to the Superior Court for action consistent with the Court's Opinion and Supplemental Opinion. (App. 37a). A judgment pursuant to the July 16 Mandate was entered by the Superior Court on July 21, 1982. (App. 36a-38a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment XIV of the Constitution of the United States of America:

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, Republic National Life Insurance Company and American Life Pension Health Associates, Inc. (ALPHA), have been held jointly and severally liable for total damages of $4.5 million arising from the termination of Respondents', Calvin and Suzanne Sparks, insurance benefits for Respondents' nonpayment of the premiums required to keep the policy in force.

Background

In August 1976, Respondents Calvin and Suzanne Sparks purchased an air conditioning business in Mesa, Arizona known as Sun Valley Sales & Air Conditioning, Inc. On April 1, 1977, Calvin Sparks met with his in-

dependent broker, Robert Bowden, to secure a group health insurance policy for his family and his company's employees. Bowden recommended and Sparks purchased a policy underwritten by Petitioner Republic, administered by Petitioner ALPHA, and funded through Planned Security Trust (PST). Calvin Sparks sent his first premium payment on April 1, 1977, along with his application. ALPHA approved the issuance of insurance to Sun Valley Sales, and mailed the certificates of insurance to the broker, who subsequently delivered them to Sun Valley Sales.

On May 1, 1977, the Sparkses' family airplane, piloted by Calvin Sparks, crashed, resulting in serious injury to Calvin Sparks and Kevin Sparks, the Sparkses' five-year-old son. Suzanne Sparks and another child received minor injuries. Respondents subsequently filed an insurance claim pursuant to their coverage with Republic, ALPHA, and PST.

Due to the severity of his injuries, Calvin Sparks was unable to manage the air conditioning business. Sun Valley Sales went bankrupt in December 1977. Insurance premiums were paid through October 1977, and Petitioners paid claims for charges incurred through November 30, 1977.[1] At that time, Petitioners had honored claims totalling more than $83,000 under the policy for the treatment of all four of the Sparks family injured in the accident.

In March 1978, Petitioners advised Suzanne Sparks that, under provisions of the policy, insurance coverage had terminated for nonpayment of premiums, and that

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[1] Although not relevant to its holding, the Arizona Supreme Court erred in stating that premiums had been paid through December 16, 1977. That was the day on which the business closed, but premium payments had been made only through October and claims were paid through November pursuant to a grace period provision in the policy.

Petitioners therefore would not pay further benefits to Calvin or Kevin Sparks for expenses and treatment incurred after December 1, 1977.

Proceedings in the Trial Court

On January 10, 1980, Respondents brought an action alleging breach of contract and tort claims against Republic, ALPHA, and PST. Respondents sought past and future unpaid insurance benefits under the policy, and general and punitive damages arising from the defendants' alleged tortious termination of insurance benefits. An eight-day jury trial began on August 26, 1980.

At the close of *plaintiffs'* case, the court, *on its own motion*, directed a verdict for the plaintiffs on the contract issues, ruling that all contract rights were fixed by terms of a sales brochure and not by the insurance contract, and that defendants had breached their contract by refusing to continue the payment of benefits once premium payments had ceased. This occurred before any defendant had made an opening statement or called a single witness. Thus, the basic liability issue in the case was decided adversely to the defendants without their having the opportunity to be heard.[2] The trial continued on other issues.

In delivering its charge to the jury, the court read an instruction on tort damages relating to the bad-faith claims which measured the reasonableness of the insurer's claim denial on the basis of "whether the conduct of the

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[2] Defendants challenged this irregularity in their Motion for Judgment Notwithstanding the Verdict and Motion for New Trial (Memorandum of Points and Authorities in Support of Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial at 1-2). The motions were denied by the trial court. The point was preserved on appeal in the Arizona Supreme Court (Appellants' Opening Brief at 11-12; 16-18), and mentioned again in the Motion for Rehearing in that court (Appellants' Memorandum in Support of Motion for Rehearing at 2).

insurer was *justified* and reasonable under the circumstances . . . ." (emphasis added). The inadequacy of the jury instruction was challenged in Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial (Defendants' Memorandum of Points and Authorities at 44-46). The motions were denied by the trial court. The challenge was preserved on appeal in the Arizona Supreme Court (Appellants' Opening Brief at 27-32), and renewed in the Motion for Rehearing (Appellants' Memorandum at 1, 11-15, 23).

At the conclusion of the trial, the jury returned a verdict against all three defendants in the amount of $1,551,000 in compensatory damages and $3,000,000 in punitive damages.

On September 22, 1980, a special hearing for the award of attorney's fees was conducted to the court without a jury. At the request of plaintiffs and over defendants' protest, the court entered a protective order denying defendants the opportunity to inspect the fee agreement between plaintiffs and their counsel. The court ruled that it would review the agreement *in camera* and that this would assure that the final award did not exceed the statutory limit prescribed under Arizona law. The court then assessed attorney's fees against defendants in the sum of $80,000. Defendants challenged this ruling in their Motion for Judgment Notwithstanding the Verdict and Motion for New Trial (Defendants' Memorandum of Points and Authorities at 74, 76), which were denied by the trial court. The point was preserved on appeal in the Arizona Supreme Court (Appellants' Opening Brief at 14-15, 48-49, 52-55).

Judgment was entered on September 23, 1980 (App. 34a-35a), and defendants filed a timely notice of appeal from the judgment of the Superior Court in the Court of Appeals of the State of Arizona.

The *Noble* Decision

On February 17, 1981, while Petitioners' appeal was pending, the Arizona Supreme Court rendered its opinion in *Noble v. National American Life Insurance Company*, 624 P.2d 866 (Ariz. 1981), which created the previously nonexistent (in Arizona) tort of bad-faith refusal to pay an insurance claim, and clearly set forth the elements of the tort. *Id.* at 868.

Under *Noble*, a jury instruction that properly embodies the elements of the tort must include the following: (1) plaintiff must establish the absence of a reasonable basis for denying policy benefits; (2) plaintiff must *also* show that the insurer knew that there was no reasonable basis for the denial or acted in reckless disregard as to whether there was a lack of reasonable basis; (3) the jury must determine the absence of a reasonable basis for denying the claim in light of whether a "reasonable insurer under the circumstances" would have denied or delayed payment; and (4) an insurance company that challenges the claims of its insured which are "fairly debatable" is not acting in bad faith. *See id.*

Proceedings In The Appellate Courts

Defendants raised the following arguments on appeal:

1. The trial court committed reversible error by its prematurely and *sua sponte* directing a verdict against defendants on the contract issues before defendants had begun to present their defense.

2. The trial court's instruction to the jury on the tort of bad faith was inadequate under the standard established in *Noble v. National American Life Insurance Company*, omitting several material elements of the tort as defined in *Noble* and misstating the law with regard to the elements it did include, thus unfairly prejudicing defendants.

3. The trial court erred by submitting the tort theories to the jury on the basis of joint and several liability.

4. The trial court's award of $80,000 in attorney's fees on the basis of an *in camera* review of relevant evidence which the trial court prohibited defendants from inspecting deprived defendants of Constitutional due process.

On June 10, 1982, the Supreme Court of Arizona entered its Opinion,[3] affirming the judgment as to defendants Republic and ALPHA and reversing as to defendant PST. (App. 1a). The court (1) approved without discussion the trial court's grant of a directed verdict against defendants at the close of plaintiffs' case in chief; (2) found "no error" in the jury instruction on bad-faith refusal of coverage; (3) affirmed the $3 million punitive damage award which the jury had returned against all three defendants, while simultaneously holding that the judgment against one of the defendants—PST—must be reversed; and (4) ruled that the trial court's order preventing defendants from examining evidence affecting the trial court's award of attorney's fees was consistent with Constitutional due process.

On June 25, 1982, all defendants filed a timely Motion for Rehearing, alleging errors of fact and law contained in the Court's Opinion which necessitated reversal for a new trial before a properly instructed jury. Because the Supreme Court had affirmed the judgment on the basis of a jury instruction which appeared at variance with the Court's own recently enunciated landmark ruling in *Noble*, defendants were joined by numerous *amici* in the insurance industry, who asserted that the jury instruction approved in the present case departed radically from

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[3] Defendants had noted their appeal to the Arizona Court of Appeals. The case was transferred to the Arizona Supreme Court pursuant to Rule 19, Arizona Rules of Civil Appellate Procedure.

the law announced in *Noble*, and that under the jury instructions so approved an insurer could be held liable for punitive damages even though the plaintiff had shown neither that coverage had been denied without an objectively reasonable basis nor that the insurer knew or recklessly disregarded the lack of a reasonable basis for that denial, both of which showings were required under *Noble*. 624 P.2d at 868. In addition to renewing earlier objections raised in the appeal, defendants argued that the dismissal of defendant PST required a new trial as to Petitioners Republic and ALPHA on the lump-sum punitive damage award which the jury had imposed upon all three defendants.[4]

On July 15, 1982, the Arizona Court entered its Supplemental Opinion. (App. 32a). The Supplemental Opinion in its entirety reads as follows:

> The jury instructions in this case were given before this court's decision in *Noble v. National American Life Insurance Co.*, 128 Ariz. 188, 624 P.2d 866 (1981). In the case at issue, the challenged instructions on the tort of bad faith were held not to constitute reversible error. *We*, however, *do not approve the use of those instructions* in future cases. *Our case of Noble sets out the principles which should be embodied in instructions involving the tort of bad faith.*
>
> The motions for rehearing are denied.

(emphasis added). The Court did not address any of the other issues.

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[4] Appellants' Memorandum in Support of Motion for Rehearing at 2-10. As it was clearly impossible to foresee that the dismissal of defendant PST alone would be granted, defendants thus raised this issue at the earliest possible juncture in the proceedings.

REASONS FOR GRANTING THE WRIT

The Arizona Supreme Court's decision contains four holdings, each of which denied Petitioners due process of law. Taken together, those holdings clearly merit review by this Court. That is particularly so since the jury verdict against Petitioners affirmed by the Arizona Supreme Court is the largest award of punitive damages against an insurance company for the tort of bad-faith refusal of coverage ever sustained on appeal by the highest court of a state.

I. The Arizona Supreme Court Violated Due Process By Affirming the Trial Court's Sua Sponte Grant of a Directed Verdict for Plaintiffs at the Close of Plaintiffs' Case.

At the close of the plaintiffs' case, before the defendants had had the opportunity to put on any evidence, the trial court, *sua sponte*, granted a directed verdict for the plaintiffs on the issue of the defendants' liability on the insurance contract. (App. 39a-40a). In other words, the trial court directed a verdict against Republic and ALPHA, holding that they were liable to the plaintiffs, without giving them a chance to present their case. That action was affirmed by the Arizona Supreme Court.

There is nothing more basic to due process than the opportunity to be heard in one's defense in a civil or criminal case. *Ballard v. Hunter*, 204 U.S. 241, 255 (1907). That right is an "immutable principle[] of justice which inhere[s] in the very idea of free government which no member of the Union may disregard . . . ." *Holden v. Hardy*, 169 U.S. 366, 389 (1898). *Accord, Galpin v. Page*, 85 U.S. (18 Wall.) 350, 368-69 (1873).

As could be expected, this *sua sponte* directed verdict on the liability issue gravely injured the ability of Re-

public and ALPHA to defend the lawsuit.[5] The Arizona Supreme Court affirmed on a holding that the insurance policy was defective because an "ordinary person[]" would not have understood it to provide for continued payment of claims only while premiums are kept up. (App. 11a-12a). Quoting (selectively) the testimony of the plaintiff Suzanne Sparks, the court held that the plaintiff had established that she had in fact had that defective understanding. (App. 12a). Only on this factual basis did the Supreme Court of Arizona affirm.

But Republic and ALPHA had been prevented from introducing any evidence on this factual issue—the common understanding of the insurance contract by lay people in general and the plaintiff in particular—by the *sua sponte* grant of a directed verdict by the trial court. Thus, in finding liability, the Arizona Supreme Court relied upon evidence of the plaintiffs that Republic and ALPHA, as defendants, had been denied any opportunity to rebut. Republic and ALPHA had, but could not present, evidence in their possession that showed that the plaintiff had behaved inconsistently with her testimony as to her understanding of the contract.

In sum, Republic and ALPHA were denied the opportunity to present their defense on the issue of their liability under the insurance contract. They were barred from presenting their own rebutting evidence on the very point where the Arizona Supreme Court held the plaintiff's evidence to be critical. Republic and ALPHA did not get a hearing at all on that issue. This violated due process.

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[5] Of course, after this directed verdict the trial continued on questions of bad-faith refusal of coverage and damages, but defendants did not seek leave, and no doubt would not have been permitted, to put on their evidence on the liability point already decided by the trial judge. Saunders v. Shaw, 244 U.S. 317, 319 (1917).

II. The Arizona Supreme Court Affirmed a Judgment Based on Jury Instructions It Simultaneously Held to Be Erroneous.

The Arizona Supreme Court arbitrarily ignored its duty to act as a court and to decide cases according to legal principles by affirming a jury verdict that it simultaneously held to have been based upon erroneous instructions. In *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 302 (1937), Justice Cardozo, speaking for the Court, found that protection from arbitrary action is the "very essence" of due process (as characterized in *Slochower v. Board of Education*, 350 U.S. 551, 559 (1956)). There could not be anything more fundamental to a judicial system than that courts decide particular cases in accordance with the legal holdings in those cases, and yet, quite clearly, the Arizona Supreme Court has twice departed from that fundamental principle.

A. The Arizona Supreme Court Affirmed a $3 Million Verdict for Bad-Faith Refusal to Pay a Claim and Simultaneously Held That the Jury Instruction on That Issue Was Improper.

The Arizona Supreme Court first recognized the tort of bad-faith refusal of an insurer to pay a valid claim in *Noble v. National American Life Insurance Co.*, 128 Ariz. 188, 624 P.2d 866 (1981). The Petitioners herein argued strenuously to the Arizona Supreme Court that the charge given in the present case was erroneous under the doctrines set by *Noble*. In its initial decision in the present case, however, the Arizona Supreme Court rejected that position and held that there was "no error in the instruction given by the trial judge." (App. 14a). A petition for rehearing was filed by Republic and ALPHA and supported by a number of *amici*, also insurance companies, asserting generally that the decision did depart radically from *Noble* in that the instruction on bad faith

in the present case did not require a showing that a refusal of coverage must be intentional or made with reckless disregard of the lack of reasonable basis for denial, and that the tort is not committed if the insurance company's action involves a challenge to a fairly debatable claim.[6]

In acting on rehearing, the Arizona Supreme Court agreed, explicitly disapproved the use of the instructions given in the present case, and insisted that "*Noble* sets out the principles which should be embodied in instructions on cases involving the tort of bad faith." (App. 33a). It could hardly be clearer that the court was holding that the present instructions did not accord with the "principles" set out in *Noble*. Nonetheless, the Court did not disturb its affirmance of the present case. This, we submit, was an arbitrary action fundamentally so at odds with principled decisionmaking as to constitute a violation of the due process of law.

In its very brief denial of rehearing, the Arizona Supreme Court offered, as an apparent explanation for its action, the statement that its earlier holding in this case had not been that the charge was valid, but merely that it "[did] not . . . constitute *reversible* error." (App. 33a) (emphasis added). But that is a mischaracterization, since, as quoted above, the court had originally held: "We find *no error* in the instruction given by the trial judge." (App. 14a) (emphasis added).

In sum, the main opinion holds that the charge accorded with *Noble* and, by implication, could properly be given again. Indeed, that is precisely the basis for Re-

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[6] Brief in Support of Appellants' Motion for Rehearing by Amici Curiae American Council of Life Insurance and Health Insurance Association of America at 2-4; Memorandum of Amici Curiae Connecticut General Life Insurance Company *et al.* in Support of Motion for Rehearing at 3-5; Brief of Amici Curiae American Title Insurance Company *et al.* at 1-5.

public and ALPHA's decision to seek rehearing and was the stated basis for the support for rehearing urged by other insurance companies as *amici curiae*. It is equally clear that the denial of rehearing holds that the charge did not accord with *Noble*, and that any other judgment based upon that instruction would be reversed on appeal. For example, if the present case had to be retried for some reason, there is no question that the same charge could not be used. The denial of rehearing by the Arizona Supreme Court thus clearly affirms a judgment based upon jury instructions that it simultaneously holds were erroneous.[7] The Arizona Supreme Court's action denies due process of law because it recognizes that it is not based upon the law.

B. The Judgment Requires Petitioners to Pay Punitive Damages Assessed Against Another Defendant That the Arizona Supreme Court Held Should Not Be Liable.

Punitive damages of three million dollars were assessed by the jury, jointly and severally, against three defendants: Republic, ALPHA, and PST. The instructions required the jury to take the defendants' size and resources into account in assessing the amount of punitive dam-

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[7] The denial of rehearing also points out that the jury instructions were given before *Noble* was decided (App. 33a), but no suggestion can be drawn from this that the Arizona Supreme Court here merely decided not to make *Noble* retrospective. Arizona follows a rule on retrospectivity that is at least as strict as the federal rule, and under neither rule could *Noble* be denied retrospective application. Peagler v. Phoenix Newspapers, Inc., 560 P.2d 1216, 1220-21 (Ariz. 1977); Chevron Chemical Co. v. Superior Court, 641 P.2d 1275, 1279 (Ariz. 1982); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981). Even more fundamentally, the jury charge in the present case did not reflect the application of law as it existed in Arizona before *Noble*. There was no cause of action for bad-faith refusal of coverage before *Noble*, and thus the jury charge in the present case was nothing more than an inadequate attempt to predict the law on this point.

ages.[8] The jury apparently did so, awarding a lump three-million-dollar sum against all three defendants.

On appeal, however, the Arizona Supreme Court held that the trial court had erred in holding one of the three defendants, PST, to be liable. (App. 18a). The court also held that the jury instruction "regarding joint and several liability in tort as to PST *was improper* . . . ." (App. 18a) (emphasis added).

Nonetheless, the court refused to disturb the jury verdict of punitive damages itself even though it held that the jury had been erroneously instructed. Because the court refused to disturb the judgment, the remaining two defendants, Petitioners here, have had to pay damages assessed by the jury in an amount sufficient to punish *three* defendants when the Arizona Supreme Court held that one of those defendants should not have been subject to punitive damages. Thus, part of the jury verdict on punitive damages—the amount the jury assessed to punish PST under the erroneous instructions—was necessarily excessive and erroneous. Had the jury been properly instructed, without PST as a defendant, it is all but certain that it would have returned a substantially lower amount as punitive damages.[9] *Washington Gas Light Co. v. Lansden*, 172 U.S. 534, 555-56 (1899).[10]

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[8] The trial court instructed the jury that it could award punitive damages "in an amount which you feel will adequately punish defendants for *their* conduct . . . ." (App. 41a-42a) (emphasis added). The trial court further instructed the jury that "in determining the amount of punitive damages to be awarded, you may consider the financial worth or wealth of *the defendants*." (App. 42a) (emphasis added).

[9] With the jury's award of three million dollars to punish three defendants, the assumption is inescapable that the jury roughly assessed one million dollars per defendant.

[10] In *Washington Gas Light*, this Court held, in very similar circumstances, that the judgment must be reversed and the cause retried, because "the original verdict was against the three defend-

Republic and ALPHA have been forced to pay the entire judgment in this case. Just as clearly, part of that judgment constitutes punitive damages assessed by the jury to punish PST, even though the Arizona Supreme Court held that PST could not be held liable. Thus, Republic and ALPHA have had to pay damages that the Arizona Supreme Court has held should never have been assessed—damages to punish an act that, the court held, did not occur. It is certainly a violation of due process for Republic and ALPHA to be required to pay damages attributable to an action which the court holds at the same time is not wrongful.

III. The Arizona Supreme Court Denied Petitioners Due Process of Law By Approving the Trial Court's Reliance Upon Documentary Evidence That Petitioners Were Forbidden to See Which Affected the Trial Court's Award of $80,000 in Attorney's Fees.

The trial court held a separate hearing on the award of attorney's fees. To assure that the fees awarded were within the statutory limitation prescribed by Arizona statute,[11] Republic and ALPHA sought discovery of the

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ants . . . and it is possible, if not probable, that if a verdict had been rendered against the individual defendant alone, it would have been for a materially less amount." 172 U.S. at 555. The present case is *a fortiori*, since the Court's doubt as to the result on retrial was due to a question as to whether the jury was assessing punitive (or merely compensatory) damages. *Id.* at 554-55. Here there is no doubt.

[11] A.R.S. 12-341.01 provides in applicable part:

> A. In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees. This section shall in no manner be construed as altering, prohibiting, or restricting present or future contracts or statutes that may provide for attorney's fees.
>
> B. The award of reasonable attorney's fees awarded pursuant to subsection A should be made to mitigate the burden of the

fee agreement between plaintiffs and their counsel. The trial court ruled that it would review the fee agreement *in camera* before making its award, but refused to permit Republic and ALPHA to inspect the agreement.

The Arizona Supreme Court approved the trial court's *ex parte* receipt of evidence with the *ipse dixit* that "[t]he hearing and the judge's personal inspection of the fee agreement adequately safeguarded defendants' due-process rights." (App. 28a).

Such a procedure is a flat and incontestable violation of due process. The due process right to a hearing is "nullif[ied]" without an opportunity to see the evidence: "[T]here is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93 (1913). This Court held in *Louisville & Nashville* that to satisfy due process:

> [a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

Id. at 93. *Accord, Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937).

There can be no question that the Arizona Supreme Court violated due process in affirming a judgment based upon documentary evidence that Republic and ALPHA were not allowed to see.

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expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted, but such award may not exceed the amount paid or agreed to be paid.

CONCLUSION

In its opinion, the Arizona Supreme Court made several determinations which, taken singly or together, deprived Petitioners of Constitutional due process as guaranteed by the Fourteenth Amendment and as interpreted in decisions of this Court.

For these reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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